

Nazari (Migration) [2020] AATA 4887 (4 November 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Shegofa Nazari
CASE NUMBER:	1935871
HOME AFFAIRS REFERENCE(S):	BCC2015/2924974
MEMBER:	P. Maishman
DATE:	4 November 2020
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa: • cl.100.221(2)(b) of Schedule 2 to the Regulations.

Statement made on 04 November 2020 at 4:48pm

CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – Subclass 100 (Spouse) – continuing spousal relationship – financial aspects – nature of household – parents of a child together – social aspects – nature of commitment – credible and honest witnesses – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 9 December 2019 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 7 October 2015 on the basis of her relationship with her sponsor. At that time, Class BC contained one subclass: Subclass 100 (Partner).
4. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221 because the delegate was not satisfied the applicant continued to be the spouse of the sponsor.
6. The applicant appeared before the Tribunal on 4 November 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Ghulam Sakhi Nazari.
7. The Tribunal hearing was conducted with the assistance of an interpreter in the Dari and English languages.
8. The applicant was represented in relation to the review by her registered migration agent.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The Tribunal had before a copy of the Department's file containing the visa application form, the parties' marriage certificate, and undated statements from the parties.
11. The applicant gave the Tribunal a copy of the delegate's decision record with her application for review. The Tribunal wrote to the applicant on 30 April 2020 requesting further information or evidence to support her application. The Tribunal received a copy of a birth certificate showing the applicant and sponsor are parents of a child born 1 May 2019, a number of photographs of the parties together, with other people, and with their child; a statutory declaration from the sponsor's brother, Reza Nazari dated 8 May 2020; a letter from the Commonwealth Bank showing the applicant and sponsor opened a joint account on 3 March 2020; and an undated letter from the applicant's representative.
12. The Tribunal raised its concern with the representative the documentary evidence provided in response to the Tribunal's request for information on 30 April 2020 did little to assist the Tribunal to consider the matters the letter identified were required to be considered. For example a letter from a bank saying the parties opened a joint account seven years after they were married is not persuasive the financial aspects of the parties' relationship is indicative of a genuine spousal relationship. One statutory declaration from the sponsor's brother is not persuasive the social aspects of the parties' relationship is indicative of a genuine spousal relationship.

13. The applicant and sponsor gave evidence separately at the hearing. The Tribunal questioned them about their relationship history, development of their current relationship, knowledge of each other's backgrounds and family relationships, the financial, social and household aspects of their relationship and the nature of their commitment to each other. Their responses were generally consistent, differing enough to indicate they were providing authentic responses from their own perspectives and knowledge. The Tribunal also questioned the applicant and sponsor jointly and observed their interaction with one another. The Tribunal observed they clearly had a close and cooperative relationship as expected from people in a genuine relationship. The Tribunal found the applicant and sponsor to be credible and honest witnesses and accepts their oral evidence on that basis.

14. The issue in the present case is whether the applicant and sponsor continue to be in a spouse relationship.

15. Whether the parties are in a spouse or de facto relationship

16. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, among other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen.

17. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring partner' within the meaning of that term.

18. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

19. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Department's file contains a copy of the applicant and sponsors marriage certificate confirming they were married on 26 September 2013. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

20. The Tribunal considered the evidence of the financial aspects of the applicant and sponsors relationship, including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

21. There is documentary evidence the applicant and sponsor opened a joint account on 3 March 2020. The parties gave consistent oral evidence the sponsor is employed and provides for all the financial needs of his wife and their daughter. The applicant and sponsor operate their own individual accounts. The parties do their shopping together so the sponsor pays for any purchases, household items, baby items and groceries. The sponsor puts money into the applicant's account if ever she needs to buy anything in his absence. They do not pay rent or have any utilities in their name because they live with the sponsors brother in the house he owns. The sponsors brother is responsible for all the utility bills. They are soon to move into their own rental accommodation and will be responsible for their own rent and utilities, to be paid by the sponsor. The Tribunal accepts the parties' oral evidence about their financial arrangements.
22. The applicant and sponsor own a motor vehicle but do not have joint ownership of assets or joint liabilities. There is no evidence before the Tribunal there are any legal obligations owed by one party to the other. The sponsor works in paid employment during the day and the applicant cares for their child and does house-work and prepares meals. The sponsor provides financially for the applicant. The reliance of the applicant and the sponsors willingness to financially support her demonstrates a pooling of financial resources and a sharing of day-to-day household expenses that is indicative of a couple in a genuine married relationship.
23. The Tribunal considered the evidence of the nature of the household of the applicant and sponsor including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
24. A birth certificate provided by the applicant confirms the applicant and sponsor are the parents of a child born on 1 May 2019. The parties gave consistent oral evidence the applicant cares for the child during the sponsors working day, when the sponsor returns from work they care for and play with their daughter together. The parties were consistent in their oral evidence about their sleeping arrangements and who they shared their accommodation with. The parties were also consistent in their evidence that the sponsor cooked one or two times a week and was, in fact, a very good cook. The Tribunal accepts the parties' oral evidence.
25. The applicant and sponsor share responsibility for the care and support of their daughter. The nature of the applicant and sponsors household is indicative of a couple in a genuine married relationship.
26. The Tribunal considered the evidence of the social aspects of the applicant and sponsors relationship including whether they represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
27. The Tribunal had regard to the statutory declaration of Mr Reza Nazari. Mr Nazari is the sponsors brother and confirms the applicant and sponsor live together with him. The parties gave consistent evidence of a recent community celebration they attended together. The parties gave consistent evidence of how they spend their spare time together and what they like to do together with their daughter.
28. There is little independent evidence demonstrating whether the applicant and sponsor represent themselves to other people as being married. The Tribunal gives the statutory declaration of Mr Reza Nazari some weight the sponsors family recognises the applicant and sponsor are a married couple. The Tribunal gives weight to the parties' consistent evidence they undertake social activities together. The social aspects of the applicant and sponsors relationship are indicative of a couple in a genuine married relationship.

29. The Tribunal considered the evidence of the nature of applicant and sponsors commitment to each other including the duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
30. The parties gave oral evidence they have been married now for seven years. They are soon to move into their own rental accommodation together. They hope to buy their own house. They see their relationship as ongoing and long-term. The Tribunal accepts the parties' oral evidence.
31. The nature of the applicant and sponsors commitment to each other is indicative of a couple in a genuine married relationship.
32. The Tribunal has considered the circumstances of the relationship as set out in r.1.15A(3). The Tribunal is satisfied that at the time of this decision the parties have a mutual commitment to a shared life to the exclusion of all others, they are in a genuine and continuing relationship, and they live together. Therefore at the time of application the parties meet the requirements for a spousal relationship within the meaning of s.5F(2)(b)-(d).
33. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision.
34. Therefore the applicant meets cl.100.221(2)(b).
35. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 100 visa.

DECISION

36. The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa:
 - cl.100.221(2)(b) of Schedule 2 to the Regulations

P. Maishman
Member

37.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).